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CHARLES ELMORE C
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Supreme Court of the United States

OCTOBER TERM, 1936

No. 22

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,
Appellants,

vs.

YOUNG'S MARKET COMPANY, et al.
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR REHEARING

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TABLE OF CONTENTS

PAGE

PETITION FOR REHEARING 1

CERTIFICATE 3

BRIEF

I

Appellees Ask no Rewriting of 21st Amendment..... 4

Contention as to Effect of 21st Amendment based on Distinction between Commercial and Police Power 5

Fact that before the Amendment a State Could not tax the right to import, does not warrant the conclusion that it may discriminatorily tax such right under the Amendment 10

Conceding the power of a state to establish a monopoly, the power to discriminate does not follow 11

Legalizing trade and commerce in domestic beer while excluding foreign beer not a proper exercise of police power 12

Power to prohibit does not include power to discriminate 13

PAGE

21 Amendment not the test of state power..... 15

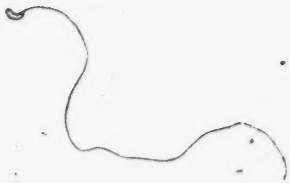
Are the Provisions of the Act Discriminatory?..... 15

II

Do the Provisions of the State Act Complained of Violate the Equal Protection Clause of the 14th Amendment? 17

TABLE OF CASES CITED

	PAGE
Asbell v. *Kansas*, 209 US 251	6
Baldwin v. *Seelig*, 294 US 511	14
Brown v. *Maryland*, 25 US 419	16
Colgate v. *Harvey*, 296 US 404	19
Cook v. *Pennsylvania*, 97 US 566	16
Crossman v. *Lurman*, 192 US 189	5
Emert v. *Missouri*, 156 US 296	5
Foster-Fountain Pack. Co. v. *Haydel*, 278 US 1	13
Geer v. *Connecticut*, 161 US 519	6
Kidd v. *Pearson*, 128 US 1	20
Leisy v. *Hardin*, 135 US 100	13
Mintz v. *Baldwin*, 289 US 346	6
Oregon, Washington RR Co. v. *Washington*, 270 US 87, 101	6
Pabst-Brewing Co. v. *Crenshaw*, 198 US 17, 26	8
Philips v. *City Mobile*, 208 US 472	12
Plumley v. *Massachusetts*, 155 US 461	5
Premier-Pabst Sales Co. v. *Grosscup*, 298 US 226	16
Prout v. *Starr*, 188 US 537	5
Schollenberger v. *Pennsylvania*, 171 US 1	16
Scott v. *Donald*, 165 US 58, 100	8
Silz v. *Hesterberg*, 211 US 31	6
Sligh v. *Kirkwood*, 237 US 52	5
State Freight Tax Cases, 15 Wall 232	6
State of Ohio v. *Helvering*, 292 US 360	11
United States v. *Hill*, 248 US 420, 426	7
Vance v. *Vandercook*, 170 US 438, 450	9
Walling v. *Michigan*, 116 US 446	20
Welton v. *Missouri*, 91 US 275	18
Wilkerson v. *Rahrer*, 140 US 545	5, 6



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PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come now the Appellees in the above entitled cause and present this, their Petition for a Rehearing of said cause, and in support thereof respectfully show:

I

The Court erred in holding:

(a) that the sustaining of plaintiffs' contention would require a rewriting of the 21st Amendment;

(b) that the case does not present a question of discrimination prohibited by the Commerce Clause;

(c) that under the 21st Amendment and the Commerce Clause, the State is not required, if it permits manufacture and sale, to let imported liquors compete with domestic liquors on equal terms;

(d) that a state may permit the domestic manufacture and sale of beer and exclude all made without the state;

(e) that the fees exacted from an importing wholesaler are not violative of the Commerce Clause.

II

The Court erred in holding that the Act of the State of California, in the provisions complained of, is not violative of the Equal Protection Clause of the 14th Amendment.

In support of this Petition for Rehearing, appellees submit the Brief hereto appended.

Wherefore, upon the foregoing grounds, it is respectfully urged that a rehearing be granted, and that the decree of the District Court be affirmed.

Respectfully submitted,

FREDERICK H. WOOD,
Of Counsel.

M. J. DONNELLY,
C. J. LYNCH, JR.,
WILLIAM M. DALLAS,
JOHN E. O'HORA,
Attorneys for Appellees.

CERTIFICATE

I, M. J. Donnelly, hereby certify that I am one of the attorneys for the Appellees in the above entitled cause, and that the foregoing Petition for Re-hearing is not presented for purposes of delay or vexation, but is presented in good faith, and is in my opinion well founded in law and fact and proper to be filed herein.

M. J. Donnelly

Attorney for Appellees.

BRIEF

I

In this case, this Court has for the first time passed upon the 21st Amendment. The conclusions reached are of sweeping effect. The consequences inevitably following the holding that the Commerce Clause no longer precludes discriminatory legislation as to liquors are of vital importance. The destruction of all harmony among states in their commercial relations under the sanction of the broad pronouncements of the Opinion that a state may forbid, either entirely or upon such conditions as it may prescribe, all importations of beer made without the state while freely permitting the manufacture and sale within, far transcends in importance the immediate issues of this case. For such reasons and upon the grounds of the foregoing Petition, appellees feel justified in urging a reconsideration.

If a state is now permitted, as to intoxicating liquor, to accord unequal treatment to the products of other states, or to those handling them, it is the only field in which such inequality of treatment is tolerated.

Does the 21st Amendment either in intent or in its terms necessitate or justify such conclusion?

Appellees Ask No Rewriting Of The 21st Amendment

No re-writing of the Amendment is sought. Not the slightest diminution of the proper effect of the Amendment is urged.

To determine the construction of and the effect to be given to the Amendment requires consideration not of the Amendment alone but of the Amendment as a part of the Constitution into which it is written. "The Constitution of the United States with the several amendments thereof, must be regarded as one

instrument, all of whose provisions are to be deemed of equal validity." *Prout* v. *Starr*, (188 US 537.)

Appellees' Contention As To Effect Of 21st Amendment Based Upon Distinction Between Commercial Power And Police Power.

Prior to the Amendment, concededly the states had no right to tax importation. As to intoxicating liquors, in common with other merchandise, there existed two distinct powers, the commercial power of the National Government, and the police power of the state. Prior to the 21st Amendment, the only power possessed by a state to deal differently with intoxicating liquors than it might deal with other goods generally was its police power. Certainly its power was no different thereafter. The Amendment did not confer any new power. It did say that "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof is hereby prohibited," but this did not purport to confer any new power upon the state to make its enactments the "laws thereof". Certain it did accomplish a change in the theretofore supremacy of the Acts of Congress in the exercise of commercial power over the acts of a state in the exercise of its police power. But, recognizing the supremacy of state acts in this field, the distinct nature of the two powers was in nowise impaired.

Numerous cases have recognized the distinction between the commercial power as to which the National Government is supreme and the police power of the state, and have held that that which was not a part of commerce was within the police power of the state. *Wilkerson* v. *Rahrer*, (140 US 545). Compare also *Plumley* v. *Massachusetts*, (155 US 461) as to colored oleomargarine; *Crossman* v. *Lurman*, (192 US 189), artificially colored coffee; *Emert* v. *Missouri*, (156 US 296) requiring license of itinerant peddlers; *Sligh* v. *Kirkwood* (237 US 52) pro-

hibiting exportation of immature citrus fruit; *Asbell* v. *Kansas*, (209 US 251), *Mintz* v. *Baldwin*, (289 US 346), diseased cattle; *Geer* v. *Connecticut* (161 US 519), *Silz* v. *Hesterberg*, (211 US 31), importation of wild game.

The state statutes in the cited cases were those enacted under the police power, the purpose of which being not to regulate commerce but to protect the public morals, health, safety, etc.

As said in *Oregon, Washington etc. R. R.* v. *Washington*, (270 US 87, 101):

> "In the relation of the States to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied that field by regulating interstate commerce and so necessarily has excluded state action."

In case of *State Freight Tax*, (15 Wall 232), (cited in the Opinion), the distinction between the police power and the commercial power is clearly recognized.

> "Cases that have sustained State laws, alleged to be regulations of commerce among the states, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations."

In *Wilkerson* v. *Rahrer* (140 US 545), in which the validity of congressional action was held to rest upon this distinction, it was said:

> "'The power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 22 US 9 Wheat. 1, 203, (6:23, 71), reaches everything within the territory of a State not surrendered to the National Government.' But

it was not thought in that case that the record presented any question of the invalidity of State Laws, because repugnant to the power to regulate commerce among the States. It is upon the theory of such repugnancy that the case before us arises, and involves the distinction which exists between the commercial power and the police power, which 'though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them.'"

If the power of the state before the Amendment and now, to legislate either in prohibition or regulation of commerce in intoxicating liquor, is solely police power, when any state legislation is challenged, is not the only question for decision whether the legislation is a proper exercise of police power?

The Amendment removes limitations restricting state action when such action is confined to the appropriate power of the state. Still there remains the commercial power in the National Government. The police power of the state, the scope of which has been thus enlarged, and the Commerce Clause still co-exist. Congress still can forbid transportation of all liquor in interstate commerce, notwithstanding the power in each state to legalize the traffic in liquor within its borders. *United States* v. *Hill*, (248 US 420, 426). Thus, under the Commerce Clause, Congress can prohibit that which a state permits, but Congress cannot, since the 21st Amendment, legislate to permit that which a state in the proper exercise of its police power prohibits. If this be not so, then the Amendment is to be given a construction which does require a rewriting, a construction that the commercial power has been withdrawn from Congress as to liquor without express words in the Amendment, and such acts of the Congress as the "Public Enforcement Act of 1936, Act of June 25,

1936" (Public Law 807), regulating interstate traffic in liquors, are, therefore, beyond the power of Congress.

The State may now exercise its police power unfettered by the commercial power so long as such legislation is an appropriate exercise of the police power. But, "The question whether a given state law is a lawful exercise of the police power is still open and must remain open to this Court." *Scott* v. *Donald,* (165 US 58, 100).

"Certainly the regulation of the sale of liquor is essentially a police power." *Pabst Brewing Company* v. *Crenshaw,* (198 US 17, 26). By reason of the Amendment a state may ban all commerce in intoxicating liquor. In so doing it does not discriminate. It exercises its police power. Likewise, it may license or regulate the manufacture, handling, and sale of liquor. If it does so without discrimination against the products of other states and those engaged in handling them, it properly exercises its police power and under the Amendment the Commerce Clause interposes no obstacle to its so doing.

If it does not remove such liquors from the field of commerce but undertakes, in legalizing and regulating commerce therein, to injuriously discriminate against the products of other states, it is, in so doing, not exercising police power but is entering the domain of commercial power, and the Commerce Clause still stands to forbid such action.

If a state may prohibit, either directly or by the imposition of a prohibitory importation tax, the introduction into the state of foreign liquors while at the same time adopting a policy of permitting domestic manufacture, sale, and use of such liquors, it follows that a state may use its police power to foster and promote its own industries in the manufacture and sale of domestic products by excluding all competition with the products of other states. By so prohibiting, the power of the state would be directed at foreign manufactured liquors not because they were liquors but because they were foreign. Such state action clearly is the

exercise of a commercial power and, in the correct sense of those words, not a police law.

In *Vance v. Vandercook Co.*, (170 US 438, 450), (cited in the Opinion), speaking of a state law which injuriously discriminated against the products of other states, this Court said that a law "in consequence of such discrimination was not a police law in the correct sense of those words". If, then, state power is police power, and if a law discriminating against the products of another state is not, as to such aspect thereof, a police law, in the correct sense of those words, does not the law as clearly offend now as before the Amendment?

While the Amendment provides that:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquor in violation of the laws thereof is hereby prohibited,"

surely it cannot be said that every statute enacted by the state as a police regulation is beyond challege as an improper exertion of state power. If injurious discrimination stamps the statute as not a proper police law "in the correct sense" of those words, is the statute any less void now than before the adoption of the Amendment?

To hold that the Amendment removes all restrictions on state legislation when the state is confining its laws to the proper exercise of police powers gives the Amendment every force and effect that its language and the purposes and intent procuring its adoption require. To hold that the Commerce Clause still forbids state action in the commercial field involves no rewriting of the Amendment nor any departure from the plain language thereof. The insistence that equality of treatment must be accorded is not based upon an assertion that such condition must by construction be written into the Amendment. It is founded upon what is asserted to be the effect of the provisions of the Constitution, including the Amendment as a part thereof.

The Fact That Before The Amendment A State Could Not Tax The Right To Import, Does Not Warrant The Conclusion That It May, Under The Amendment, Discriminatorily Tax Such Right.

Because a state could not, before the 21st Amendment, have exacted a fee for the privilege of importation "even if it had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business," the Opinion concludes that this case does not, therefore, "present a question of discrimination prohibited by the Commerce Clause." To say that prior to the Amendment, under the Commerce Clause, unaffected by Congressional permission, the state could not tax importation, and that the Commerce Clause conferred the right to import free, is but to recognize that importation was within the field into which the state in the exercise of its police power had no right to enter. Any tax sought to be imposed by a state for this privilege was void not because the state was exercising a commercial power, but because it was exercising its police power over a field in which the federal commercial power was supreme.

When the state undertook to discriminatorily tax intoxicating liquors which had left the channels of interstate commerce, its action was void, not because it was acting in a field in which the power of Congress was supreme, but because its effect was to exert a commercial regulation, not a police regulation. In other words, before the Amendment the situation was simply this: a State could not, under the guise of its police power, regulate commerce by discriminating against articles because they had been in commerce, nor could it exercise its police power upon a field over which the action of Congress was supreme so long as Congress refrained from permitting State action.

In determining the validity of State legislation, is it not now a question which is resolved by an investigation to ascertain

whether the legislation is a proper exercise of police power, or whether it is an invasion of commercial power? Such investigation is not now to be precluded because before the Amendment the State could not exert its police power upon the field of commerce and, for such reason, it was unnecessary to distinguish between commercial power and police regulation so far as the validity of State action was concerned. With the Amendment redefining the lines of State and Federal supremacy in the appropriate exercise of their powers, it does now become important to determine whether the action of the State through discriminatory burdens in effect constitute commercial regulations.

Conceding The Power Of A State To Establish A Monopoly, The Power To Discriminate Does Not Follow.

If a state establishes a state monopoly of the manufacture and sale of beer, does it not thereby remove the commerce in intoxicating liquors from the field of private commerce, both as to its own citizens and those of other states, and thereby place all privately manufactured liquors upon an equal basis? If it may so do, does it follow that it may authorize and legalize the manufacture and sale within its borders and exclude or discriminatorily tax the products of other states?

If a state monopoly is established, no inequality of treatment would thereby result as between private dealing in either domestic or foreign beer. If it is permitted to establish such a public monopoly, and its conduct of such business is not a governmental function, (*State of Ohio* v. *Helvering*, 292 US 360), its prohibition of others from manufacturing and selling would be an exercise of its police power.

Legalizing Trade And Commerce In Domestic Beer While Excluding Foreign Beer Not A Proper Exercise Of Police Power.

Clearly a state may permit the manufacture and sale of beer while prohibiting absolutely hard liquors. The action so taken would be well within its police powers. Appropriate basis for such action would readily appear.

Is there not, however, a well-defined distinction between such assumed action on the part of the state and the legislation legalizing and regulating the traffic in beer but prohibiting importation or placing an injuriously discriminatory burden on foreign beer solely because of its out-of-state origin?

What conceivable object of police power could be said to be served by authorizing or encouraging the domestic manufacture and sale of beer and, at the same time, excluding the like product made in other states? If California can legally enact a law permitting domestic manufacture and sale, and prohibiting all importation, could that state prohibit the importation of all beer manufactured in New York and Pennsylvania while permitting the importation of beer manufactured elsewhere? Wherein would one enactment be any less a law thereof than the others? Would not, in either case, the State be acting beyond its police power?

If the state now has the power to tax importation, it must be subject to the qualification that in the exercise of such power discrimination does not thereby result. Whether the fee be high or low is not the test. If the exaction of a high license fee for importation is deemed necessary, then an equal exaction must be imposed in some manner upon the domestic product, or discrimination results. In *Phillips* v. *City of Mobile,* (208 US 472), the license fee was not discriminatory.

> "This license tax is exacted without reference to the question as to where the beer was manufactured,

whether within or without the state, and hence there is no discrimination in the case." (208 US 479).

Power To Prohibit Does Not Include Power To Discriminate

Is it accurate to say that because the State may prohibit all commerce in liquor, it may regulate in a manner injuriously discriminating against the products of other states? If total prohibition be enacted, liquor is removed from commerce. While before the Amendment the Commerce Clause, unaffected by Congressional Acts, precluded the states from declaring what should or should not be a part of commerce (*Leisy* v. *Hardin*, 135 US 100), the State may now declare that liquor shall be excluded from all commerce. If the state determines not to exclude but recognizes liquor as a proper subject of commerce, then the fact that it might have determined to exclude, but did not, should not permit it to regulate discriminatorily.

If it be urged that the power to prohibit confers the power to regulate arbitrarily or discriminatorily, that because all traffic in intoxicating liquors might be banned, no complaint can be made of any terms or conditions imposed in permitting such traffic, the answer is that the power to absolutely prohibit or outlaw the subject-matter as a subject of commerce, affords no basis for the claim to unreasonably or discriminatorily regulate when the subject-matter is made a legitimate subject of trade and commerce.

In *Foster-Fountain Packing Company* v. *Haydel*, (278 US 1), it is recognized, that, where a State had the right to absolutely prohibit the exportation of shrimp, but determined not so to do but to permit the product to be shipped and sold in interstate commerce, that the commodity became entitled to the rights of private ownership and the protection of the Commerce Clause. It is said:

"As the representative of its people, the State might have retained the shrimp for consumption and use

> therein. But, in direct opposition to conservation for intra-state use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in inter-state commerce, the State necessarily releases its hold, and, as to the shrimp so taken, definitely determines its control. Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the State is deemed to own or control the shrimp for the benefit of its people and those taking the shrimp under the authority of the Act necessarily thereby become entitled to the rights of private ownership and the protection of the Commerce Clause."

When the State enters the field of commercial power, it matters not whether the subject-matter is beer or barley. When it remains in the sphere of police power, a vast difference in its power to act is recognized. Any non-discriminatory legislation may be held to be the exercise of police power even though it may also be an exercise of the power to tax. Discriminatory legislation designed to favor State products falls without the police power, and if the Commerce Clause remains for any purpose, it protects against such legislation.

Our position cannot be better stated than in the expression, "Neither the power to tax nor the police power may be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the products of another state, or the labor of its residents." (*Baldwin* v. *Seelig*, 294 US 511).

Twenty-First Amendment Not The Test Of State Power

In final analysis, does not the error of the Opinion lie in using the Twenty-first Amendment as a source of State power? It will not do to involve our reasoning in this circuity by saying that the 21st Amendment makes transportation unlawful if in violation of State law, and, to determine the validity of State law, we look to the 21st Amendment. By saying that the 21st Amendment makes unlawful the shipment of liquors into any State in violation of laws passed pursuant to power existing at the time of the adoption of the Amendment, results in the police power of the State becoming, by virtue of the Amendment, superior to the commercial power of Congress and retains perfect harmony within the Constitution and the Amendments. The effect of appellees' contention is as stated in the Opinion that—"The State may prohibit the importation of intoxicating liquors, provided it prohibits the manufacture and sale within its borders; but, if it permits such manufacture and sale, it must let imported liquors compete with domestic on equal terms,"—but such result is arrived at not by a construction of the Amendment, but by giving proper effect to the plain words of the Amendment, together with the provisions of the Constitution of which it is a part.

Are The Provisions Of The Act Discriminatory?

Thus far in our discussion we have assumed discrimination in the California statute. We have reviewed the sweeping conclusions reached which would seem to likewise assume, as the basis for their statement, the existence of discrimination. We shall now briefly point out wherein the statute complained of does in fact discriminate.

While it is true, as stated in the opinion, there is no discrimination under the statute as to the right to sell as between wholesalers selling domestic and foreign beer, it is not to be put out

of view that sale is only one phase of the wholesaler's business. Before he can sell, he must purchase, and, to determine whether he who sells imported beer is discriminated against, the burden placed upon him in carrying on the necessary elements of his business, (purchase and sale) must be compared with the burden placed upon one purchasing and selling domestic beer at wholesale. The licensee importing beer and wholesaling it is not engaged in two separate occupations. Importation is but an incident of his purchase outside the state, and purchase is as essential to his business as sale.

To make the initial sale of foreign beer in California, a wholesaler must pay a $500 importing and a $50 wholesaler's fee. A tax upon either the right to import or the right to sell, or upon both, may be considered a tax upon the commodity itself. *Schollenberger* v. *Pennsylvania,* (171 US 1); *Brown* v. *Maryland,* (25 US 419); *Cook* v. *Pennsylvania,* (97 US 566).

These cases recognize that sale is the object of importation, and an essential ingredient of that intercourse of which importation constitutes a part. A license, to import only, would be valueless.

Whether as in the Pennsylvania case (*Premier-Pabst Sales Company* v. *Grosscup,* 298 US 226), the payment of one license fee is exacted for both importation and sale, or whether two fees be required, one for importation and one for sale, the result is the determining factor on the question of discrimination. Breaking up the business unit into component parts and placing a license fee on each part cannot be made the basis for avoiding that which would be a discriminatory burden, if the occupation were treated as a unit and one fee exacted. The business embraces essentially these component parts, and the aggregate fees exacted for these privileges determines the burden placed upon the business. The total fee required to be paid before the product can be sold by the importing wholesaler is the basis for the comparison with the charges imposed upon the business of sim-

ilarly dealing in and selling domestic products. Only by comparison on that basis can it be determined whether equality of treatment exists.

To support the statement of the Opinion that this case does not present a case of discrimination prohibited by the Commerce Clause, the Court reasons that before the Amendment a state could not tax importation even if it "exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business". The comparison is made to test discrimination, and, there being no such tax imposed by the State of California upon intra-state transportation from the place of manufacture to the wholesaler's place of business, discrimination exists by the very test of the Opinion.

We, therefore, earnestly contend that, as between the importing wholesaler and the other wholesalers, discrimination exists. While so contending, we also maintain that irrespective of the treatment as between wholesalers, discrimination is found if the comparison be made as between the taxes imposed upon other businesses licensed by the Act. Our position as to this will be more fully developed hereafter.

II

Do The Provisions Of The State Act Complained Of Violate The Equal Protection Clause Of The 14th Amendment?

In the Opinion it is said: "A classification recognized by the 21st Amendment cannot be deemed forbidden by the 14th." For the purpose of the exertion of the police power of the State, does the 21st Amendment recognize a classification enabling the state in regulating the transportation and sale of liquor to impose higher taxes upon the business of those handling liquor produced out of the state than are imposed upon those handling domestic products?

Does the Amendment recognize a classification as between foreign and domestic liquors? Does it not rather remove the line previously separating such liquors as the subject of state action, and, for the exertion of police power of the state, place both domestic and foreign liquors in one class to be equally subject to state legislation? Is there then any more substantial basis for classifying such liquors on the sole ground of their origin than there is to classify ordinary merchandise which has been imported and become a part of the common mass of the property of the state from identical merchandise produced in the State? In either case, the sole basis of classification would be the place where the goods originated. A tax upon the business of handling merchandise, the imposition of a license fee, or occupation tax, is in effect an imposition of a tax on the merchandise. (*Welton* v. *Missouri*, 91 US 275).

Recognizing the right to classify and to impose different exactions upon different classes, it is, of course, essential that the classification be reasonable, not arbitrary, and rest upon some difference "that bears a just and proper relation to the attempted classification". When the state is given the same power to prohibit or regulate intoxicating liquors of foreign origin, as it has with respect to its domestic products, can it be said that the Amendment, so enlarging the field of state action by removing limitations previously existing, recognizes and preserves a line which it obliterates?

We urge, therefore, that the Amendment itself does not recognize but removes a previously existing barrier and merges for the purpose of police action the two classes: the one which the state previously possessed full power to prohibit or regulate, and the other which, in the absence of congressional permission, it could neither prohibit nor regulate.

Again, it is said that "The classification in taxation made by California rests on conditions requiring difference in treatment". If, as is here contended, discrimination exists, does the fact that

the beer sold in the state comes from two sources permit different treatment of the product, or of those handling it, when such discrimination is based wholly upon the origin of the product?

Does the difference in source justify a classification which permits higher taxes to be placed upon the occupation of importing and selling the domestic product? The classification is not made upon any difference in the things classified for they are of the same kind. It should not be sustained because the liquors are manufactured at different places as that is a purely arbitrary classification. Is there then any just and reasonable basis for the attempted classification?

When a state determines to authorize and permit private commerce in liquors, and then classifies for the purpose of imposing higher or greater burdens upon the liquor produced in other states, can the right to classify the subject-matter be found to rest upon any sufficient ground when its sole basis is the place of origin? Clearly in numerous decisions as to other merchandise, it has been held that no such basis of classification can be relied upon. Upon the point we are considering, is there any difference in principle between classification of commodities generally and liquors when the classification is sought to be sustained on no other distinction than that stated? Is not the language in the opinion in *Colgate* v. *Harvey*, (296 US 404, 423) directly applicable?

> "As the Supreme Court of Vermont itself has pointed out, in all such cases it must appear not only that a classification has been made, but that it is one based on some reasonable ground. *State* v. *Hoyt*, 71 Vt. 59, 64-66; 42 Atl. 973. The decision in that case held invalid a state statute the effect of which was to impose a tax upon sales of goods manufactured in the state, while leaving sales of goods manufactured in other states free from taxation. It was held that the classification could not be based on any difference in the goods, because there was none; nor on the fact that they were made in different states, for that bore no

> just and proper relation to the classification, but was purely arbitrary; nor on the difference of residence of the manufacturers, for the same reason. And clearly the view of the court was that a like discrimination against the products of another state would have been open to the same objections."

It is respectfully submitted that no classification recognized by the 21st Amendment warrants the state action here complained of, and that the classification in taxation made by California is not one resting upon any proper basis.

The Opinion points out that the brewer of domestic beer is required to pay a license fee of $750, while the brewer of foreign beer cannot be subject to state tax, and that only the importer can be reached, he being subject to a license fee of $500. The occupation of a manufacturer is essentially unlike that of an importing wholesaler.

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation." (*Kidd* v. *Pearson*, 128 US 1).

In *Walling* v. *Michigan*, (116 US 446), it was held that the business of soliciting and selling for nonresident concerns was not comparable to that of a manufacturer, and that the tax paid by the manufacturer was not to be compared with the tax imposed upon agents for nonresident manufacturers soliciting and selling. It was there said:

> "Of course the Act of 1875 does not assume to tax nonresident persons or firms for doing business in an-

> other state. They are subject to taxation in the state where they are located. It is the business of selling for such nonresident parties or soliciting orders for them for sale in Michigan of liquors imported into the State, that is the object of taxation under the law; and any person engaged in those employments, or either of them, is subject to the tax of $500 per annum. Now, is such a tax, or any tax imposed upon those who are engaged in the like employment for persons or firms located in Michigan, selling or soliciting orders for the sale of liquors manufactured in that state? Clearly not. The tax imposed by the Act of 1881 is a tax on the manufacturer or dealer. * * * In the one case it is a single tax on the principal; in the other it is a tax, not on the principal, for he cannot be taxed in Michigan, but on each and all of his servants and agents selling or soliciting orders for him. The tax imposed by the Act of 1875 is not imposed on the same class of persons as is the tax imposed by the Act of 1881. That this must give an immense advantage to the product manufactured in Michigan, and to the manufacturers and dealers of that state, is perfectly manifest."

Under that decision a tax upon an agent selling non-domestic liquors within the state is not rendered nondiscriminatory because a tax is imposed upon the manufacturer of domestic liquor in a greater amount, and this is true even though the foreign manufacturer cannot be taxed by the state, and only those selling the product in the state can be reached. If the occupations are so dissimilar that taxation of the manufacturer cannot render nondiscriminatory the tax imposed on the importing wholesaler, the record in this case clearly presents discrimination. However, even if the occupation of a manufacturer is to be treated as comparable to that of an importing wholesaler, discrimination appears. The importing wholesaler is required to pay a much higher fee to obtain only part of the rights received

by the manufacturer for a lesser fee. The practice of bottling by wholesalers is common throughout the country and is recognized by the State of California in this Act which provides for the issuance of a bottler's license (Juris. Stat., page 15 - Act, Sec. 5 (11) and by Rule 9 (e) of the Board of Equalization providing as follows:

> "(e) Importer's License Does Not Authorize Sale. —Every licensed importer who proposes to bottle or prepare imported alcoholic beverages or to sell such beverages in this State must first obtain appropriate Manufacturer's and Wholesaler's or Retailer's Licenses as provided in the Act. An Importer's license does not authorize bottling, preparation or resale of alcoholic beverages nor does any other license authorize importation of such beverages." (R.61)

Prerequisite to the first sale of beer bottled in California, the total fees required by the Act to be paid as to domestic beer are $750 and as to foreign beer $1050. An importing wholesaler, who bottles his imported beer in California, must pay a $500 importer's license fee, a $500 bottling or packaging fee. and a $50 wholesaler's license fee. (Juris. Stat., page 15, Sec. 5, sub-section 8, 11, 13). The California brewer pays a manufacturer's license fee of $750, and by such payment acquires the right not only to manufacture, bottle, package, and sell, (Juris. Stat., page 16, Act, Sec. 6 (a)) but the further right to purchase beer from another manufacturer, and to bottle and sell the product so purchased. (Juris. Stat., page 28, Act, Sec. 29). Thus, the manufacturer may not be an originator of the product. The privileges conferred by his license enable him not only to produce his own beer, and to bottle and package for the market and sell the same, but also to purchase, bottle, package, and market the product of others. To obtain all these privileges the local manufacturer has to obtain only one license and to pay a fee of only $750. The importing wholesaler,

to enjoy a part only of such privileges, and no other, must pay $1050.

It would seem, therefore, that from whatever standpoint the question is considered and whatever factors are held to be the proper basis of comparison, it should be concluded that equality of treatment has not resulted. In the absence of any proper basis for classification to afford a distinctly different treatment of the matter, the statute under consideration offends the Equal Protection Clause.

It is earnestly and respectfully submitted that the conclusions reached in the Opinion should be reconsidered and the Petition for Rehearing, in support of which this argument is made, sustained.

Respectfully submitted,

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